IN THE

SUPREME COURT OF THE UNITED STATES

No. 70-18, 1971 Term

JANE ROE, JOHN DOE, MARY DOE, AND JAMES HUBERT HALLFORD, M.D.,
Appellants,

v.

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

PETITION FOR REHEARING

JOHN L. HILL
ATTORNEY GENERAL OF TEXAS
JOHN M. BARRON
FIRST ASSISTANT ATTORNEY GENERAL
LARRY F. YORK
EXECUTIVE ASSISTANT ATTORNEY GENERAL
JOE DIBRELL
ASSISTANT ATTORNEY GENERAL
Attorneys for Respondent
HENRY WADE
CRIMINAL DISTRICT ATTORNEY
Dallas, Texas
Supreme Court Building
Austin, Texas 78711

INDEX

TABLE OF AUTHORITIES

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Pursuant to Section 1 of Rule 58 of this Court, Respondent, [redacted] respectfully prays for a rehearing of the decision and judgment of the Court insofar as it declares the Texas abortion statutes unconstitutional.

Respondent urges two points as grounds for rehearing:

I.

THE SUPREME COURT ERRED IN SUBSTITUTING ITS SOCIAL BELIEFS FOR THE JUDGMENT OF THE TEXAS LEGISLATURE, WHICH SUBSTITUTION AMOUNTS TO A REVIVAL OF THE DOCTRINE OF SUBSTANTIVE DUE PROCESS, EARLIER DISCARDED BY THE COURT IN *FERGUSON V. SKRUPA*, 372 U.S. 726 (1963).

The constitutional test traditionally applied by this Court to social legislation such as the Texas abortion statutes, is whether or not such laws have a "rational

relation to a valid state objective." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955). While all may not agree with the objectives of the Texas statutes, this Court may not constitutionally substitute its judgment for the collective wisdom of the people of Texas, speaking through their legislature, unless it chooses to revive the doctrine of "substantive due process," said by this Court to have been laid to rest forever in *Ferguson v. Skrupa*, 372 U.S. 726 (1963):

> "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), outlawing "yellow dog" contracts, Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915), setting minimum wages for women, Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), and fixing the weight of loaves of bread, Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said,
>
> 'I think the proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious

meanings by reading into them conceptions of public policy that the particular Court may happen to entertain.'

And in an earlier case he had emphasized that, 'The criterion of constitutionality is not whether we believe the law to be for the public good.'

"The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislative against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."

The theological, philosophical, medical, and legal worlds are divided on just when the fetus can be considered to be "human." For the Court to enter the controversy and to deny that the Texas statutes have any "rational relation" to a "valid state objective" is simply to accept as rational those philosophies comporting with the Court's views, and to condemn as irrational all others.

The comments of Mr. Justice Curtis, dissenting in

the *Dred Scott* decision, seem apropos here:

> "When such a method of interpretation of the Constitution obtains, in place of a republican government, with limited and defined powers, we have a government which is merely an exponent of the will of Congress or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this Court." *Dred Scott v. Sanford*, 60 U.S. 393, 621 (1856).

The State's abortion statutes relate logically and rationally to the State's objective—preservation of fetal human life and preservation of the mother's health. Surely the prevention of the extinguishment of the life of a human fetus, is a "valid state objective." The embryo is a fully potential human being from the moment of conception. For the Court to find a basis for its far-reaching decision in unduly narrow definitions of "person" and "life," is to avoid the basic moral and legal issue before the Court. The fetus and the mother are entitled to protection of law, in *all* stages of development.

The question here is not one of postponement of life, but one of the taking of life. The State's "valid objective" in trying to prevent the intentional taking of that life in *all* stages of development cannot be subordinated to a vaguely defined "right of privacy" or to this Court's own social and economic beliefs.

After discussing attitudes of various groups from man's dim beginnings to the present (none of which were in evidence), the Court discards all considerations except the (not unanimous) medical view that abortions performed prior to the end of the first trimester are none less dangerous than normal childbirth, so that at that time the State obtained a "compelling interest" in the pregnancy. If that single consideration

is to define "compelling interest," then, presumably, as medical science continues to advance, and as the dangers of abortions—and all surgical procedures—continue to decrease, one might well find, in twenty years, that the "compelling" point has moved up to five months, or six, or seven months, or has disappeared completely.

Selection of the third trimester—being the period of "viability"—as the time during which the State may proscribe abortions, except for reasons of the mother's health, likewise has little basis in logic. To say that a State may prohibit the killing of a fetus *only* after the fetus has gained the ability to live outside the womb is to deny the fact that the process from conception to birth is a continuum, and that the incident of "viability" truly has no more to do with "rational relation to valid state objective" than does the appearance of a discernible heartbeat, or a host of other (early) developmental features. Few mothers or fathers, who badly wanted children, would be much consoled by the knowledge that their unwanted miscarriage had occurred in the second trimester—before "viability"—their loss is that of a human life, with the potential to be born and live outside the womb, as well as within.

II.

THE SUPREME COURT ERRED IN FAILING TO EXTEND TO UNBORN CHILDREN PROTECTION, EQUAL TO THAT OF THE MOTHER, UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

That the fetus is "alive" from the moment of conception is not now disputed. That it is "human"—in appearance as well as potential—cannot be denied. The fetus is a "person," within the meaning of the

Constitution and its Amendments, and is entitled to be protected *equally* with the life and health of the mother.

It has long been clear in the law that an unborn child may inherit or take under a will; that recovery may be had for injuries suffered by the unborn child prior to birth; that he may recover for the death of his father, even though that death occurs prior to the birth of the child; and that the unborn child has a host of other legal rights which would hardly be accorded a merely biological lump.

This Court cites *McGarvey v. Magee-Womens Hospital*, 340 F.Supp. 751 (W.D.Pa. 1972) for the proposition that a fetus is not a "person" within the meaning of the Fourteenth Amendment. But that court saw the question before it somewhat differently (emphasis ours):

> "The narrow question is whether *we* will afford fetal life constitutional protection." 340 F.Supp. 751, 754.

Then, making it clear that the Court was not passing on the issue of whether a fetus is a "person," but rather passing on the issue of whether a *court*, instead of a *legislature*, should determine the question, the Court said:

> "One need not be a strict constructionist to answer this in the negative, for to answer otherwise would be to create a new administrative jungle in the name of a civil right never heretofore conceived. *This is a problem for the legislatures of the various states. They must decide the problems in the light of moral issues, the conflicting rights of mother and child, the extent of medical knowledge and the interests of the state.*" (emphasis ours) 340 F.Supp. 751, 754.

This Court also cites *Byrn v. New York City Health*

& Hospitals Corp., 286 N.E.2d 887 (1972) as holding the fetus not to be a "person" within the meaning of the Constitution. But in that case, the Court of Appeals of New York, being asked to enjoin application of the New York statute allowing abortions in limited instances, stated:

> "There are, then, real issues in this litigation, but they are not legal or justiciable. They are issues outside the law unless the legislature should provide otherwise. The Constitution does not confer or require legal personality for the unborn; the legislature may, or it may do something less, as it does in limited abortion statutes, and provide some protection far short of conferring leagl personality." 286 N.E.2d 887, 890.

Clearly, that Court felt that the judgment was to be made by the legislature of the State of New York, and, having been made, should not be disturbed by the courts, on the basis of some court-imposed theory of personality.

As Mr. Justice Jasen said, concurring:

> "As Judge Breitel's opinion [the majority opinion] recognizes, the formidable task of resolving this issue is not for the courts. Rather, the extent to which fetal life should be protected 'is a value judgment not committed to the discretion of judges but reposing instead in the representative branch of government.' *Corkey v. Edwards*, 322 F.Supp. 1248, 1254 (D.C.N.C. 1971, appeal pending)." 286 N.E.2d 887, 891.

The other cases cited by this Court in reaching its conclusion that a fetus is not a "person" can hardly be seen as controlling on the question. *Cheaney v. Indiana*, 285 N.E.2d 265 (1972) merely upholds a state criminal conviction for committing an abortion. *Montana v. Kennedy*, 366 U.S. 308 (1961) deals merely with whether citizenship is determined by place of birth or

by place of conception. *Keeles v. Superior Court*, 470 P.2d 617 (Cal. 1970) merely holds that an unborn, but viable, fetus is not a "human being" within the meaning of a California state statute on murder. *State v. Dickinson*, 275 N.E.2d 599 (Ohio 1970) deals only with whether death of a fetus might be considered "vehicular homicide," under an Ohio statute.

In short, the issue of whether a fetus is a "person," entitled to equal protection under law, has not been decided elsewhere, except where courts have (rightfully) held that that is a decision for the representative branch of government.

This Court is now squarely presented with the question, and should hold that a fetus is a "person," entitled to protection of life, under the Equal Protection Clause of the Fourteenth Amendment, equal to the protection of life afforded to the mother, and to all other persons.

WHEREFORE, premises considered, Respondent moves the Court to grant the rehearing herein prayed for.

Respectfully submitted,

JOHN L. HILL
ATTORNEY GENERAL OF TEXAS

JOHN M. BARRON
FIRST ASSISTANT ATTORNEY GENERAL

LARRY F. YORK
EXECUTIVE ASSISTANT ATTORNEY GENERAL

JOE DIBRELL
ASSISTANT ATTORNEY GENERAL

Attorneys for Respondent

Supreme Court Building
Austin, Texas 78711

HENRY WADE
CRIMINAL DISTRICT ATTORNEY
Dallas, Texas

CERTIFICATE OF COUNSEL

I certify that the within Petition for Rehearing is presented in good faith and not for delay.

LARRY F. YORK
EXECUTIVE ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

This is to certify that on the 14th day of February, 1973, copies of this Petition for Rehearing were mailed, postage prepaid to counsel of record for the Petitioner.

LARRY F. YORK
EXECUTIVE ASSISTANT ATTORNEY GENERAL